No. 91-1590

Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term, 1991

Jeffrey B. Fawell — *Petitioner*

v.

Marisu Cesena and DuPage County — *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

1. Under what circumstances may an attorney be made a witness against his client without running afoul of the United States Constitution's Fifth Amendment prescription that "No person . . . shall be compelled in any criminal case to be a witness against himself."

2. If a State offers immunity to a person and then withdraws or frustrates that person from availing himself of the immunity so offered, may the State then order the person's attorney to be a witness against him without affording to him use immunity as extensive in scope as the protection afforded to him by the United States Constitution's Fifth Amendment privilege against compelled self incrimination?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JEFFREY B. FAWELL, PETITIONER

V.

MARISU CESENA, and
DU PAGE COUNTY, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO
THE ILLINOIS SUPREME COURT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court entered in this proceeding on December 2, 1991.

OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported at 145 Ill. 2d 32 and at 582 N.E. 2d 177. It is reproduced in the Appendix. The opinion of the Illinois Appellate Court is reported at 201 Ill. App. 3d 96 and at 558 N.E. 2d 1378. It is reproduced in the Appendix.

JURISDICTION

The judgment of the Illinois Supreme Court was entered on October 17, 1991. A timely Petition for Rehearing was denied on December 2, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

FIFTH AMENDMENT,
UNITED STATES CONSTITUTION

No person . . . shall be compelled in any criminal case to be a witness against himself . . .

ILLINOIS REVISED STATUTES (1987), CHAPTER 95 1/2, SECTION 11-401

Motor vehicle accidents involving death or personal injuries.

(a) The driver of any vehicle involved in a motor vehicle accident resulting in personal injury to or death of any person shall immediately stop such vehicle at the scene of such accident, or as close thereto as possible and shall then forthwith return to, and in every event shall remain at the scene of the accident until the requirements of Section 11-403 have been fulfilled. Every such stop shall be made without obstructing traffic more than is necessary.

(b) Any person who has failed to stop or to comply with said requirements shall, within 3 hours after such motor vehicle accident, or, if hospitalized and incapacitated from reporting at any time during such period, within 48 hours after being discharged from the hospital, report the place of the accident, the date, the approximate time, the driver's name and address, the registration number of the vehicle driven, and the names of all other occupants of such vehicle, at a police station or sheriff's office near the place where such accident occurred. No report made as required under this paragraph shall be used, directly or indirectly, as a basis for the prosecution of any violation of paragraph (a).

For purposes of this Section, personal injury shall mean any injury requiring immediate professional treatment in a medical facility or doctor's office.

(c) Any person failing to comply with paragraph (a) shall be guilty of a Class A misdemeanor.

(d) Any person failing to comply with paragraph (b) shall be guilty of a Class 4 felony.

(e) The Secretary of State shall revoke the driving privilege of any person convicted of a violation of this Section.

ILLINOIS REVISED STATUTES (1987), CHAPTER 95 1/2, SECTION 11-403

Duty to give information and render aid. The driver of any vehicle involved in a motor vehicle accident resulting in injury to or death of any person or damage to any vehicle which is driven or attended by any person shall give the driver's name, address, registration number and owner of the vehicle the driver is operating and shall upon request and if available exhibit such driver's license to the person struck

or the driver or occupant of or person attending any vehicle collided with and shall render to any person injured in such accident reasonable assistance, including the carrying or the making of arrangements for the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment, if it is apparent that such treatment is necessary or if such carrying is requested by the injured person.

If none of the persons entitled to information pursuant to this Section is in condition to receive and understand such information and no police officer is present, such driver after rendering reasonable assistance shall forthwith report such motor vehicle accident at the nearest office of a duly authorized police authority, disclosing the information required by this Section.

Any person failing to comply with this Section shall be guilty of a Class A misdemeanor.

ILLINOIS REVISED STATUTES, CHAPTER 38, SECTION 9-3

Involuntary Manslaughter and Reckless Homicide. (a) A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly, except in cases in which the cause of the death consists of the driving of a motor vehicle, in which case the person commits reckless homicide.

STATEMENT OF THE CASE

Petitioner is an attorney licensed to practice law in the State of Illinois. On September 28, 1987 at about 10:35 p.m., Petitioner (hereinafter Fawell) received a

telephone call from his law partner informing him that a potential client (John Doe) wished to consult with him regarding an emergency matter. Around 12:15 a.m. on September 29, 1987, Fawell arrived at his law office and met with John Doe. Fawell conferred with John Doe and was retained by him to act as his attorney regarding the emergency matter which had arisen. Shortly thereafter, Fawell and John Doe went to the DuPage County Sheriff's Office to file a report pursuant to Illinois Revised Statutes, Chapter 95 1/2, Section 11-401(b).

Section 11-401(b) is a complementary provision to Illinois Revised Statutes, Chapter 95 1/2, Section 11-401(a). Section 11-401(a) criminalizes "hit and run" conduct. It mandates that a person who is in an automobile accident involving death or personal injury must immediately stop

his automobile, and provide certain information to the injured party and/or to any attending police officer. The information that must be provided includes the person's name, his address, his registration (license plate) number, and the name of the owner of the automobile being driven by the person. Failure to comply with Section 11-401 is a misdemeanor offense, punishable by up to one year in the county jail and/or a fine of up to $1,000.00.

Section 11-401(b) compels a person who has committed the offense prescribed by Section 11-401(a) to report himself to the police within three hours after the accident involving personal injury or death. Section 11-401(b) makes it a criminal felony offense for a person to fail to report within three hours that he has committed the crime of "hit and run"

prescribed by Section 11-401(a). A person found guilty of violating Section 11-401(b) may be sentenced to the Illinois penitentiary system for a determinate term of anywhere from one to three years and may be fined up to $10,000.00. Such a person would also, of course, become a convicted felon and suffer the collaterol consequences of such a status. A person making a report under Section 11-401(b) must disclose to the police the following information: The place of the accident, the date and the approximate time of the accident, the driver's name and address, the registration number (license plate) of the vehicle driven, and the names of all passengers or occupants of the vehicle at the time of the accident.

To alleviate Fifth Amendment self-incrimination problems with Section 11-401(b)'s compelled reporting requirements,

the last sentence of Section 11-401(b) confers use immunity on a person for disclosing the information required to be reported under its provisions. However the immunity so provided extends only to cover any prosecution for a violation of Section 11-401(a).

Under the compulsion of Illinois Revised Statutes, Chapter 95 1/2, Section 11-401(b), Fawell and John Doe appeared at the DuPage County Sheriff's Office at about 12:30 a.m. to make Doe's report. The sheriff's deputy on duty refused to accept the report. Fawell had prepared a short statement, a series of phrases, to be read to the police officer in charge. Said short statement was made in conformity with the compelled reporting requirements of 11-401(b). After arriving at the sheriff's office Fawell went to a service window and spoke with the deputy sheriff there on

duty. Fawell told the deputy that he and his client Doe were there to make a report for Doe pursuant to the compulsion of Section 11-401(b)'s requirements. Fawell then began to read from his prepared notes but the deputy instructed him to be quiet. The deputy then told Fawell to slide the prepared statement to him, using the opening available at the base of the service window. Fawell began to slide the statement to the deputy. The deputy blocked the statement and read the top line of same which read "Tollway I-88 near Route 59." The deputy then told Fawell that this was something that happened on the tollway and that he should make his report to the Illinois State Police in Oak Brook, Illinois. There is no argument that this was a totally incorrect interpretation of the statute by the deputy. The deputy then pushed the statement back to Fawell and

told him to leave. Fawell then again explained that he was there to make the report compelled by Section 11-401(b) and that said Section mandates that the report be made at the sheriff's office or at the nearest available police station, and not at the Illinois State Police headquarters. The deputy told Fawell that he was incorrect in his understanding of the law. The deputy asked Fawell when the accident happened. Fawell replied 10:30 p.m. The deputy told Fawell that he would not accept the report. Fawell and Doe then left the sheriff's office. Shortly thereafter the three hour time period prescribed in Section 11-401(b) passed. At no time did Fawell tell or inform the deputy of the true name of Fawell's John Doe client.

Later that evening Fawell was contacted by an Assistant State's Attorney for DuPage County. The Assistant informed

Fawell that a dead body was found alongside the I-88 Tollway near Route 59. The Assistant asked Fawell to disclose the true name of Fawell's John Doe client. Fawell refused to do so. Fawell was later served with a DuPage County Grand Jury subpoena requesting him to disclose John Doe's identity. Fawell filed a motion to quash the subpoena citing the attorney-client privilege and the client's Fifth Amendment privilege. An evidentidary hearing was held on the motion to quash the subpoena before the Honorable Judge John Nelligan. After hearing testimony and arguments, Judge Nelligan quashed the subpoena.

The decedent whose body was found along the I-88 Tollway near Route 59 was Timothy J. Golden. Subsequently the Respondent herein, Marisu Cesena, as Administrator for the decedent, filed suit against the DuPage County Sheriff's Office

for their failure to accept the report pursuant to Section 11-401(b). Respondent later added John Doe as a party defendant to the lawsuit. Respondent then deposed Fawell pursuant to subpoena. Respondent asked Fawell to disclose the identity of John Doe. Fawell refused to do so. Respondent filed a motion to compel Fawell to disclose John Doe's identity. The parties submitted the transcript of the evidentiary hearing held before Judge Nelligan as the basis for Fawell's refusal to disclose Doe's identity. Judge Peccarelli ruled in favor of Respondent on the motion to compel disclosure, and ordered Fawell to disclose Doe's identity. Instead Fawell filed a motion to reconsider Judge Peccarelli's ruling. Judge Peccarelli then found Fawell in contempt of court. Judge Peccarelli ordered Fawell incarcerated and further imposed a $1,000.00 per day fine.

Fawell filed an immediate appeal to the Illinois Appellate Court. A stay of the contempt sanctions was ordered. The Appellate Court ruled against Fawell. It found that Doe had waived any attorney-client privilege by attempting to comply with the mandate of the reporting statute, Section 11-401(b). It also rejected the contention that the complusion of the statute rendered invalid the purported waiver of Doe's attorney-client privilege. The Court held that the statute, Section 11-401(b) did not compel anything from Doe. Rather it merely afforded to Doe the option of avoiding much harsher criminal penalties by turning himself in within three hours before he was first apprehended by law enforcement authorities. The Court ignored and rejected Fawell's argument that Section 11-401(b) was more akin to the reporting

statutes found unconstitutional by this Court in Albertson v. Subversive Activities Control Board, 382 U.S. 70 and Marchetti v. United States, 390 U.S. 39 (1968). Finally the Court rejected Fawell's contention that there was no valid waiver under this Court's decision in New Jersey v. Portash, 440 U.S. 450 (1979) due to the compulsion of the use immunity afforded to Doe by Section 11-401(b).

Subsequent to the Appellate Court's ruling, the Illinois Supreme Court granted Fawell's Leave to Appeal and agreed to hear the case. The issues were briefed as in the Appellate Court. However the Illinois Supreme Court, ignoring all legal arguments, rendered a decision on what it termed equitable grounds. The Court in-

voked its equitable powers and proclaimed that Fawell should make the report required by Section 11-401(b) to the trial court.

A timely petition for rehearing was filed by Fawell. The Illinois Supreme Court denied Fawell's petition on December 2, 1991.

REASONS FOR GRANTING THE PETITION

This case presents the important and recurring question regarding the circumstances under which a court can properly compel a client's lawyer to be a witness against him, without running afoul of the client's rights under the Fifth Amendment to the United States Constitution. The actual wording of the Fifth Amendment is the obvious and primary source of interpretation as to the scope and content of the Fifth Amendment's guarantee. That wording is as follows: "No person . . . shall be compelled in any criminal case to be a witness against himself."

In the case at bar the State of Illinois, acting through its judicial branch, specifically Judge Peccarelli, has issued an order compelling attorney Fawell to be a witness against his client John Doe. The Illinois Supreme Court has affirmed Judge Peccarelli's order. The

Illinois Supreme Court specifically acknowledged that in so ruling that it was disregarding the rule of law to reach what it considered to be an equitable result under all of the circumstances. The Illinois Supreme Court refused to consider the Fifth Amendment implication of its decision for client Doe in ordering Fawell to be a witness against Doe.

Petitioner Fawell contends that the courts in Illinois have erred in ordering him to disclose information that he possesses only by virtue of receiving same in the context of the privacy of an attorney - client relationship. Fawell contends that by ordering him to disclose information against his client, the Illinois courts are compelling him to be a witness against his client. Since he gained this information in the privacy of the attorney-client relationship and under

the protection of the attorney-client privilege, Fawell submits that compelling Fawell to be a witness against his client is the equivalent of requiring the client to be a witness against himself.

This Court has previously considered a similar issue to the one presented in the case at bar in Fisher v. United States, 425 U.S. 391 (1976). The Court stated the issue in Fisher to be:

"whether a summons directing an attorney to produce documents delivered to him by his client in connection with the attorney-client relationship is enforceable over claims that the documents were constitutionally immune from summons in the hands of the clients and retained that immunity in the hands of the attorney." at 393.

The Court indicated that it agreed with the proposition, concurred in by all of the parties involved in Fisher, "that if

the Fifth Amendment would have excused (the) taxpayer (client) from turning over the accountant's papers had he possessed them, the attorney to whom they are delivered for the purpose of obtaining legal advice should also be immune from subpoena." at 396.

In the case at bar the disclosure, by either the client Doe or his attorney Fawell, of Doe's true identity is tantamount to an assertion by Doe that "I am the person responsible for the death of Timothy Golden." As such the disclosure of Doe's identity opens Doe up to possible prosecution for reckless (vehicular) homicide in violation of Illinois Revised Statutes, Chapter 38, Section 9-3. Doe's flight would surely be sought to be introduced as evidence of a consciousness of guilt at such a trial. Furthermore the Illinois courts would apparently allow the

prosecution in a criminal case to subpoena attorney Fawell to give the same testimony as it presently is demanding that he give in the civil case.

The express wording of the Fifth Amendment to the United States Constitution supports a constitutional principal that the courts of Illinois should not be allowed to compel Doe's attorney to furnish information against Doe. Fisher further supports the establishment of a constitutional principle that the State should not be allowed to compel an attorney to have to disclose information that the client himself may not be compelled to disclose under the Fifth Amendment.

While the Illinois Supreme Court chose to not address the argument, the Illinois Appellate Court also rejected Fawell's argument that there was no valid waiver of Doe's attorney-client and Fifth

Amendment privileges. There can be no waiver of the client's Fifth Amendment privilege where the actions alleged to constitute a waiver are compelled.

In the case at bar Attorney Fawell and his client attempted to comply with the compelled reporting requirements of Illinois Revised Statutes, Chapter 95 1/2, Section 11-401(b). The Appellate Court held that because Attorney Fawell's client was going to submit and obey the compulsion of the law and, pursuant to a grant of statutory use immunity, disclose his identity to the sheriff's deputy, that therefore said identity is not covered by any privilege due to waiver. Therefore Attorney Fawell may be forced to be a witness against his client both at deposition and at any civil or criminal trial in which his client may be made a party defendant.

However it is axiomatic that there cannot be a waiver of privilege when there is compulsion or coercion. As this Court noted in New Jersey v. Portash, 440 U.S. 450, (1979):

"Testimony given in response to a grant of legislative immunity is the essence of coerced testimony. In such cases there is no question whether physical or psychological pressures overrode the defendant's will; the witness is told to talk or face the government's coercive sanctions, . . . The information given in response to a grant of immunity may well be more reliable than information beaten from a helpless defendant, but it is no less compelled." at 459.

CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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MARISU CESENA, Adm'r of the Estate of Timothy J. Golden, Deceased, Appellee, v. DU PAGE COUNTY *et al.* (Jeffrey B. Fawell, Contemnor-Appellant).

JUSTICE BILANDIC delivered the opinion of the court:

Jeffrey B. Fawell, an attorney licensed to practice law in Illinois, appeals from an order of the circuit court of Du Page County finding him in direct civil contempt of court for refusing to comply with a discovery order. The circuit court imposed a $1,000 fine for each day that Fawell continues in his refusal to comply with the discovery order. The circuit court directed Fawell to answer certain deposition questions. These questions pertained to the contents of an accident report which Fawell unsuccessfully attempted to file with the Du Page County sheriff's department on behalf of one of his clients, John Doe (the identity of this client remains unknown). The questions were asked during Fawell's discovery deposition conducted by counsel for plaintiff, Marisu Cesena, administrator of the estate of Timothy J. Golden, deceased (the estate). Fawell asserted that the questions sought confidential information protected by the attorney-client privilege. The circuit court disagreed and found Fawell in contempt of court. The appellate court, with one justice specially concurring, affirmed the trial court's contempt finding and reduced the fine to $100 per day. The appellate court held that the attorney-client

privilege was waived (201 Ill. App. 3d 96). This court granted Fawell's petition for leave to appeal (134 Ill. 2d R. 315). *Amicus curiae* briefs were filed by the Illinois State Bar Association and the National Association of Criminal Defense Lawyers.

The facts which give rise to Fawell's contempt citation are unusual. At approximately 10:30 p.m., on September 28, 1987, John Doe was driving a vehicle which struck and killed a pedestrian, Timothy Golden. The accident occurred on Interstate 88, in Naperville, Du Page County, Illinois. John Doe failed to stop his vehicle, identify himself or render aid to Golden.

Shortly thereafter, John Doe contacted and met with Fawell regarding this accident. The consultation took place in Fawell's law office at 12:15 a.m., September 29, 1987, which was approximately 1 hour and 45 minutes after the accident had occurred. Fawell advised John Doe that his failure to stop at the scene of the accident was a misdemeanor (hit-and-run statute). (Ill. Rev. Stat. 1987, ch. 95½, pars. 11—401(a), (c).) Fawell further advised John Doe that, pursuant to another statute (the reporting statute), he had less than 1 hour and 15 minutes to file an accident report at the office of the sheriff of Du Page County (Ill. Rev. Stat. 1987, ch. 95½, par. 11—401(b)) or else he would also be subject to felony charges for failure to timely file an accident report (Ill. Rev. Stat. 1987, ch. 95½, par. 11—401(d)). Fawell explained that, if John Doe filed a timely accident report, John Doe would not be subject to felony criminal charges, pursuant to the reporting statute, and the accident report could not be used against John Doe in any misdemeanor prosecution for violating the hit-and-run statute (Ill. Rev. Stat. 1987, ch. 95½, par. 11—401(b)).

Pursuant to this advice, John Doe related the information required by the reporting statute to Fawell, who composed a written accident report containing this infor-

mation. Fawell and John Doe then proceeded directly across the street from Fawell's law office to the sheriff's office, with the intention of filing the accident report and thereby complying with the reporting statute.

Fawell and John Doe arrived at the sheriff's office at approximately 12:50 a.m. Fawell approached the service window, which was similar to a walk-up bank facility window with thick glass and a U-shaped opening under the window. John Doe was standing in the general vicinity of this service window. Fawell attempted to read the contents of the report to Deputy Sheriff Mitchell Paine. However, upon hearing that the accident occurred on the interstate, Deputy Paine motioned for Fawell to stop reading the accident report and told Fawell that the sheriff's department was not the proper place to file the report. Paine erroneously informed Fawell that he must file the report with the State police and that Fawell had up to 48 hours after the accident to do so. Fawell informed Deputy Paine that the reporting statute permitted him to file the accident report at the sheriff's department and that the report must be made within three hours of the accident.

Again, Fawell attempted to read the contents of the report to Deputy Paine, who interrupted Fawell and refused to permit him to orally make the report. Fawell then twice attempted to submit the written document by thrusting it through the U-shaped opening of the window. Each time, Fawell's attempt was thwarted by Paine, who stopped the document by placing his hand in front of it. Frustrated in their attempts to comply with the reporting statute, Fawell and his client left the sheriff's department, taking the written accident report with them.

Upon returning to his law office, Fawell called the State police and informed them, "for humanitarian reasons," of the location and time of the accident, without

conveying the name of his client. Thereafter, Fawell received three telephone calls, one from an Illinois State police officer, and two from Du Page County assistant State's Attorneys, requesting the identity of his client. On each occasion, Fawell refused to identify his client, maintaining that he had made a timely accident report as required by the reporting statute.

The State's Attorney of Du Page County then commenced a grand jury investigation relating to the accident. A grand jury subpoena *duces tecum* was issued and served upon Fawell, commanding him to give testimony as to the accident and the identity of his client. The subpoena further requested Fawell to submit the written accident report prepared by him on September 29, 1987, for examination by the grand jury. Fawell filed a motion to quash the subpoena, asserting that the communications were protected by the attorney-client privilege. On October 28, 1987, after holding an evidentiary hearing, the circuit court of Du Page County granted Fawell's motion to quash the subpoena *duces tecum*.

On September 28, 1988, plaintiff, as administrator of the estate of Timothy Golden, filed the instant civil action against defendants, Du Page County, the sheriff of Du Page County and Deputy Mitchell Paine. Plaintiff's complaint essentially alleges that defendants' refusal to accept John Doe's accident report constituted wilful and wanton conduct. The estate alleged that defendants' conduct rendered the estate unable to exercise its legal rights against John Doe because the estate was unable to determine John Doe's identity.

In connection with this civil litigation, on March 10, 1989, plaintiff's counsel conducted the discovery deposition of Fawell. At his deposition, Fawell stated that he still possessed the accident report which he prepared on September 29, 1987. Fawell refused to answer certain

deposition questions pertaining to the contents of the accident report, asserting the attorney-client privilege.

Plaintiff filed a motion to compel Fawell to answer the deposition questions directed to the contents of the accident report. On August 28, 1989, the circuit court granted plaintiff's motion and ordered Fawell to answer the deposition questions. Fawell refused and, on August 29, 1989, the trial judge issued the contempt citation and fine at issue in the instant action. The appellate court affirmed the contempt finding and reduced the fine. Fawell now appeals to this court. The parties before this court are the estate and Fawell, who asserts the attorney-client privilege on behalf of John Doe.

The parties devote their arguments to the attorney-client privilege. However, we find that the equities of this case demand resolution on equitable grounds. Therefore, we invoke our equitable jurisdiction and deem the accident report filed as of the date and time that Fawell attempted to file the report with Deputy Paine.

This court has long held that equity has jurisdiction to correct the mistake of a county ministerial officer. (*Foster v. Clark* (1875), 79 Ill. 225; *Thornton, Ltd. v. Rosewell* (1978), 72 Ill. 2d 399, 407.) We are guided by the equitable maxim that equity considers that as done which ought to be done. *Ward v. Sampson* (1946), 395 Ill. 353, 366-67.

A prayer for general relief is an appeal to this court to evaluate the allegations and proof and to grant such relief as the equities of the case require. Courts of equity are not bound by formulas or restrained by any limitation that tends to trammel the free and just exercise of discretion. (*County of Du Page v. Henderson* (1949), 402 Ill. 179, 191-92.) This court has the power to enter such final judgment as the evidence in the record shows should have been entered. (*City of Aurora v. YMCA* (1956), 9 Ill. 2d 286, 295.) This court is statutorily autho-

rized to shape its remedy to meet the demands of justice in every case, however peculiar. (*Hoyne Savings & Loan Association v. Hare* (1974), 60 Ill. 2d 84, 90-91; see also *Pope v. Speiser* (1955), 7 Ill. 2d 231; Ill. Rev. Stat. 1987, ch. 110, par. 2—604; 134 Ill. 2d R. 366.) Moreover, it is axiomatic that where equity has assumed jurisdiction for the purpose of granting equitable relief the court may determine all the issues of the case. *McLeod v. Lambdin* (1961), 22 Ill. 2d 232, 236.

This appeal involves a statutory scheme, contained in the Illinois Vehicle Code, designed to discourage hit-and-run accidents like the one that occurred in the instant action. (Ill. Rev. Stat. 1989, ch. 95½, pars. 11—401, 11—403.) Section 11—401(a), the hit-and-run statute, requires the driver of a vehicle involved in an accident resulting in injury or death to stop and remain at the scene until he has given his name and address, registration number, exhibited his driver's license if requested, and rendered reasonable assistance to any person injured in the accident. (Ill. Rev. Stat. 1989, ch. 95½, par. 11—401(a).) Failure to comply with the hit-and-run statute is a Class A misdemeanor. Ill. Rev. Stat. 1989, ch. 95½, par. 11—401(c).

However, the legislature has provided the hit-and-run driver a "second chance" to rectify his criminal conduct of leaving the scene of an accident. Section 11—401(b), the reporting statute, provides:

> "Any person who has failed to stop or to comply with [the hit-and-run statute] shall, *within 3 hours after such motor vehicle accident*, *** report the place of the accident, the date, the approximate time, the driver's name and address, the registration number of the vehicle driven, and the names of all other occupants of such vehicle, at a police station *or sheriff's office* near the place where such accident occurred. No report made as required under this paragraph shall be used, directly or indirectly, as a basis for the prosecution of any violation of

[the hit-and-run statute]." (Emphasis added.) (Ill. Rev. Stat. 1989, ch. 95½, par. 11—401(b).)

Any person failing to comply with the reporting statute shall be guilty of a Class 4 felony. Ill. Rev. Stat. 1989, ch. 95½, par. 11—401(d).

Pursuant to the reporting statute, the legislature has provided the driver who violates the hit-and-run statute with a three-hour grace period during which he may make an accident report and thereby avoid felony prosecution pursuant to the reporting statute. Moreover, if the driver chooses to file an accident report within the three-hour time limit, the contents of the accident report may not be used against the driver in a misdemeanor prosecution for violating the hit-and-run statute. (Ill. Rev. Stat. 1987, ch. 95½, par. 11—401(b).) In the instant action, John Doe properly attempted to file an accident report within three hours of the accident. However, Deputy Paine erroneously thwarted John Doe's attempt to gain compliance with the reporting statute when he refused to accept the accident report tendered by Fawell.

This court had occasion to address these two statutes in *People v. Young* (1982), 92 Ill. 2d 236. In *Young*, defendant left the scene of an accident and was charged with violating the hit-and-run statute. The police subsequently contacted defendant and asked defendant to come to the police station for questioning. Defendant appeared at the police station, was Mirandized, and made certain oral statements regarding the accident in response to police questioning. This court construed the reporting statute broadly and found that the oral statements made by defendant constituted the accident report required by the reporting statute. As such, we held that these statements could not be used against defendant in the misdemeanor prosecution for violating the hit-and-run statute. This court reasoned:

> "The [reporting] statute's purpose is to inform those who have been injured or damaged by a hit-and-run driver of the driver's identity. This is accomplished by encouraging such drivers to take advantage of a second chance to come forward and reveal their identity. Those who do come forward will not be prosecuted for a felony, and their statements will not be used against them if they are prosecuted for the misdemeanor of leaving an accident scene." *Young*, 92 Ill. 2d at 240.

In the instant action, John Doe, unlike defendant in *Young*, *voluntarily* came forward and attempted to take advantage of the second chance afforded by the reporting statute. Fawell, on John Doe's behalf, made a *written* accident report containing the information required by the reporting statute. In compliance with the statute, Fawell and John Doe sought to file this accident report at the sheriff's department within three hours of the accident. Had Deputy Paine not erred, John Doe would have successfully filed his accident report and complied with the reporting statute. Moreover, the information contained within the accident report would not be available for use in any future misdemeanor prosecution for violating the hit-and-run statute. This is the result intended by the legislature. Instead, the actions of Deputy Paine discourage drivers like John Doe from taking advantage of the second chance afforded by the legislature pursuant to the reporting statute.

In the instant case, the appellate court held that, by preparing a written accident report and attempting to comply with the reporting statute, John Doe waived the attorney-client privilege. As a result, the appellate court ordered Fawell to comply with the circuit court's discovery order and answer questions which would disclose the contents of the written accident report. Because of a ministerial error on the part of Deputy Paine, John Doe is now placed in an impossible situation. John Doe,

through his attorney, must reveal the information normally required by the reporting statute; yet he would still be subject to felony prosecution for failing to timely comply with this statute. Moreover, the contents of this report could be used against John Doe in a misdemeanor prosecution for violating the hit-and-run statute. As a result of the appellate court's holding, the estate would receive the information contained in the accident report, and John Doe would not receive any of the statutory benefits provided by the legislature to a driver who complies with the reporting statute. This result is patently unjust.

On the other hand, it is reasonable to assume that the estate has exhausted all other reasonable means of discovering John Doe's identity. Consequently, the estate's inability to discover the contents of the written accident report through Fawell renders the estate unable to exercise its legal right to maintain a civil action against John Doe. John Doe struck and killed Timothy Golden. In violation of the law, John Doe left the scene of the accident. John Doe then attempted to file a written accident report, through which the estate would have been able to discover John Doe's identity. However, as a result of Deputy Paine's ministerial error, the estate is and will remain unable to discover John Doe's identity and exercise its legal rights against him. This result, too, would be patently unjust.

For these reasons, this court invokes its equitable jurisdiction. We find that the equities of this case require this court to correct the ministerial error of Deputy Paine. Therefore, we deem the accident report timely filed as of 12:50 a.m., September 29, 1987, and order Fawell to submit this report to the circuit court. We hold that John Doe has timely complied with the reporting statute. This result places both the estate and John Doe in the positions they would have been had Deputy Paine

not erroneously refused to accept the accident report. Moreover, this result furthers the intent of the legislature by encouraging drivers like John Doe to come forward and take advantage of the second chance afforded by the reporting statute, safe in the knowledge that they will be awarded the statutory benefits afforded by that statute.

The instant action involves an issue of first impression. Upon invoking our equitable jurisdiction, this court is charged with doing full and complete justice among all parties. (*Alter v. Moellenkamp* (1961), 23 Ill. 2d 506, 511.) Therefore, we set aside the circuit court's order finding Fawell in contempt of court and imposing a fine. See *Consolidation Coal Co. v. Bucyrus-Erie Co.* (1982), 89 Ill. 2d 103; *Sarver v. Barrett Ace Hardware, Inc.* (1976), 63 Ill. 2d 454.

For the foregoing reasons, we reverse the judgments of the circuit and appellate courts. This cause is remanded to the circuit court with directions that it order Fawell to submit to the court the accident report.

Judgments reversed;
cause remanded with directions.

In the Supreme Court of the State of Illinois:

No. 70915 Marisu Cesena, Administrator of the Estate of Timothy J. Golden, Deceased, Appellee, v. DuPage County, a Municipal Corporation and Mitchell Paine, Defendants, v. Jeffrey B. Fawell, Appellant.

DATED December 2, 1991

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

MARISU CESENA, Administrator of the Estate of Timothy J. Golden, Deceased, Plaintiff-Appellee, v. DU PAGE COUNTY, et al., Defendants (Jeffrey B. Fawell, Contemnor-Appellant).

JUSTICE INGLIS delivered the opinion of the court:

Contemnor, Jeffrey Fawell, appeals from an order of the circuit court of Du Page County finding him in contempt of court and imposing a $1,000 fine for each day that he refuses to comply with a court order. Fawell contends that he should not be required to comply with the court order because to do so would result in disclosure of information which the attorney-client privilege protects. We note here that Fawell's position is supported by amici curiae briefs of the Illinois State Bar Association (ISBA), the DuPage County Bar Association, and the Du Page Association of Women Lawyers.

This case arose as a result of a traffic accident on September 28, 1987. At approximately 10:35 p.m. that night, Fawell received a telephone call from his law partner informing him that a potential client (John Doe) wished to consult with him regarding an emergency matter. Around 12:15 a.m. on September 29, 1987, Fawell arrived at his law office and met with John Doe. Shortly thereafter, Fawell and John Doe went to the Du Page County sheriff's office to file a report pursuant to Section 11-401(b) of the Illinois Vehicle Code (Code)(Ill. Rev. Stat. 1987, ch. 95 1/2, par. 11-401(b)). However, the sheriff's deputy refused to accept a report, and no report was ever made in this case.

Thereafter, a grand jury investigation was commenced with respect to Fawell's representation of John Doe, and a subpoena

was issued upon Fawell to testify regarding his representation of John Doe. Fawell filed a motion to quash the subpoena.

On October 28, 1987, a hearing was held on Fawell's motion to quash the subpoena. Fawell testified that he and his client went to the sheriff's office to file a report pursuant to the Code. Fawell stated that he walked up to a "window" and began to read a prepared written statement to Deputy Paine but was stopped and told to give the written statement to Paine. Fawell handed the report to Deputy Paine, who, after reading where the accident occurred, informed Fawell that the report had to be submitted to the Illinois State Police department because the accident occurred on the tollway (I-88). Fawell informed Paine that it was proper to file the report at the sheriff's office and that he was under a time constraint because the

report had to be made within three hours of the accident. Paine then told Fawell that he had 48 hours to file the report and again stated that it must be done at the Illinois State Police department office in Oak Brook. After further discussion, Fawell and his client left the sheriff's department. At no time did Fawell reveal his client's name to Deputy Paine.

Fawell further testified that he received a telephone call from an Illinois State Police officer requesting his client's name, but Fawell refused to disclose the information. Two DuPage County Assistant State's Attorneys made similar requests, but Fawell continued to refuse to identify his client.

On cross-examination, Fawell testified that he called the State Police department after the sheriff's office refused to accept the report, but only did so for

"humanitarian" reasons. Fawell was not aware that the automobile accident at issue in this case involved a fatality when he went to file the report at the sheriff's office.

Deputy James Paine of the DuPage County sheriff's department testified that he spoke with Fawell on the night in question and agreed that he told Fawell to report the accident to the Illinois State Police department. Paine stated that he never saw Fawell's client and that Fawell never tendered a written report to him, although Fawell did begin to read the report to him.

On cross-exmination, Paine denied telling Fawell that he had 48 hours to file the report. He did admit, however, that he could have accepted the report instead of directing Fawell to the Illinois State Police department. Paine also agreed that Fawell's client could have been with Fawell at the sheriff's office but that he did not see him.

On November 6, 1987, the trial court granted Fawell's motion to quash the grand jury subpoena. Judge Nelligan reasoned that an attorney-client relationship existed between Fawell and John Doe, and, although the client's identity was generally not privileged information, it was privileged in this instance because the client's identity "would provide the necessary link to the State to institute a prosecution for a serious felony offense against the client."

On September 28, 1988, plaintiff, Marisu Cesena, as administrator of the estate of Timothy Golden, filed the lawsuit now before us naming DuPage County, the Sheriff of DuPage County, and Mitchell Paine as defendants. The complaint alleged that Timothy Golden was killed when he was hit by an automobile while he was walking on I-88. It further alleged that defen-

dants were negligent in that they failed to obtain the relevant information concerning the accident, including the identity of the driver of the automobile (John Doe).

On March 10, 1989, Fawell refused to answer certain questions asked at his deposition relating to John Doe's identity. Thereafter, plaintiff made a motion pursuant to Supreme Court Rule 219(a) (107 Ill. 2d R. 219(a)) to compel Fawell to answer the questions. On August 22, 1989, following numerous continuances, the trial court heard arguments on the motion to compel. On August 28, 1989, Judge Peccarelli ordered Fawell to answer four questions and continued the case to the following day. The four questions were:

"Would you please state to me the name and address of the individual that you met with on the evening of September 28, early morning hours of September 28th, 1987?

***

Did that individual at that time inform you as to an incident in which he had been involved in on I-88 that evening?
***

What did you tell him (Deputy Paine) with reference to the location?
***

Did you ever view the automobile that this individual was driving on the night of September the 28th, 1987?"

On August 29, 1989, Fawell informed the court that he would not answer the questions that he was ordered to answer. Fawell's motion to reconsider was denied, and the court subsequently found Fawell in direct civil contempt of court. Fawell was fined $1,000 per day and ordered incarcerated until he answered the questions. Fawell was released on his own recognizance, and the enforcement of the order was stayed until September 5, 1989.

On August 29, 1989, Justice Woodward granted Fawell's emergency motion requesting a stay of the trial court's order. The order effectively stayed the trial court's order until August 30, 1989. On August 30, 1989, Justice Woodward continued the stay until September 8, 1989.

On September 7, 1989, this court denied Fawell's emergency motion to stay the trial court's order pending appeal. On September 8, 1989, the Illinois Supreme Court granted Fawell's request to stay the appellate court order until further order of court. On September 14, 1989, the supreme court granted Fawell a stay of the trial court's order pending appeal. This appeal followed.

Initially, we must decide whether Fawell and John Doe had established an attorney-client relationship before we decide if the questions involved in this

case solicited privileged information. The attorney-client privilege is recognized as one of the "oldest of the privileges for confidential communications known to the common law." (Upjohn Co. v. United States (1981), 449 U.S. 383, 389, 66 L. Ed. 2d 584, 591, 101 S. Ct. 677, 682; 8 Wigmore, Evidence, Sec. 2290 (McNaughton rev. 1961); see Hazard, An Historical Perspective on the Attorney-Client Privilege, 66 Calif. L. Rev. 1061, 1071 (1978).) The attorney-client privilege exists to enable a person to consult freely and openly with an attorney without any fear of compelled disclosure of the information communicated. (People v. Adam (1972), 51 Ill. 2d 46, 48, cert. denied (1972), 409 U.S. 948, 34 L. Ed. 2d 218, 93 S. Ct. 289; Knief v. Sotos (1989), 181 Ill. App. 3d 959, 964.) The privilege has been described as being essential "to the proper functioning of our

adversary system of justice." (United States v. Zolin (1989), 491 U.S. ___, ___, 105 L. Ed. 2d 469, 485, 109 S. Ct. 2619, 2626.) The essentials of the creation of the attorney-client privilege have been defined as follows:

" '(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.' " Adam, 51 Ill. 2d at 48, quoting 8 Wigmore, Evidence, Sec. 2292, at 554 (McNaughton rev. 1961).

In the present case, Fawell testified at his hearing to quash the grand jury subpoena that John Doe sought out his

legal advice with the expectation that any communications would remain confidential. According to Fawell, all communications were made in confidence and related to the purpose that John Doe was solicitng Fawell's advice. Fawell also stated that John Doe told him that he would not waive the privilege. We do note that the court did not hear from John Doe as to the interview and his expectations concerning the communications. Under these circumstances, it is our opinion that, based on Fawell's testimony at the hearing, an attorney-client relationship was established between Fawell and John Doe such that the privilege would apply to the communications on the night in question.

However, the attorney-client privilege is not absolute (Taylor v. Taylor (1977), 45 Ill. App. 3d 352, 354.) This is so because a conflict exists between the

client's expectation that the communications remain confidential and the public's interest in the disclosure of evidence. (People v. Doe (1978), 59 Ill. App. 3d 627, 633 Taylor, 45 Ill. App. 3d at 354.) Consequently, we must balance these two competing interests in this case with respect to whether Fawell must answer the four questions which the trial court ordered him to answer. We will address each question in turn.

We note here that counsel for plaintiff, at oral argument, waived consideration of question numbers two and four. Consequently, we will limit our review in this case to the two remaining questions.

Question number one requested Fawell to state "the name and address of the individual that you met with on the evening of September 28, early morning hours of

September 29th, 1987?" Fawell argues that the identity of his client was privileged information because it was never communicated to a third party and was not waived. Fawell asserts that the attempt to report the accident, including his client's name, was under compulsion of a felony prosecution (Ill. Rev. Stat. 1987, ch. 95 1/2, par. 11-401(b)) and hence not voluntary. In addition, Fawell contends that John Doe's identity would be the "last link" necessary to bring adverse judicial proceedings, both civil and criminal, against his client.

Plaintiff disagrees, arguing instead that no privilege existed with respect to the client's identity because the requirements of Section 11-401(b) of the Code do not violate an individual's right against self-incrimination. Furthermore, plaintiff asserts that John Doe waived any

privilege with respect to his identity because he never intended his identity to be confidential.

It must be pointed out that this question, by its terms, does not ask Fawell to reveal the name of his client who was involved in the automobile accident on the night in question. The question does not ask who accompanied Fawell to the sheriff's office that night or even what information the report contained. Either of these questions would, by necessity, force Fawell to reveal John Doe's identity. Instead, the question asks Fawell whom he "met with" during the "evening" of September 28 and "early morning hours" of September 29. The question poses a problem if Fawell "met with" individuals other than John Doe during the times in question. However, the questions before and after the question of whom Fawell "met with" seem to limit the

"individual" to John Doe, although the question could have been phrased to leave no doubt as to limiting the question to John Doe's identity. Given that both parties briefed, argued, and generally agreed that this question seeks John Doe's identity from Fawell, we will review this question with these considerations in mind.

The general rule in Illinois is that a client's identity is not protected under the attorney-client privilege. (People v. Williams (1983), 97 Ill. 2d 252, 295 cert. denied (1984), 466 U.S. 981, L. Ed. 2d 836, 104 S. Ct. 2364; Shatkin Investment Corp. v. Connelly (1984), 128 Ill. App. 3d 518, 525; People v. Doe (1977), 55 Ill. App. 3d 811, 814.) While disclosure of the client's identity is generally favored, there are two situations in which the identity falls within the protection of the privilege. First, the

client's identity will be protected when it is shown to be in the public interest to do so (Shatkin Investment Corp., 128 Ill. App. 3d at 525; M. Graham, Cleary & Graham's Handbook of Illinois Evidence Sec. 505.4, at 257 (4th ed. 1984).) Second, the identity is privileged if it appears that the client will be prejudiced in "some substantial way" if his identity were disclosed. Williams, 97 Ill. 2d at 295; Doe, 55 Ill. App. 3d at 814; R. Ruebner, Illinois Criminal Trial Evidence, ch. 3, at 50-51 (1986).

Fawell does not argue that John Doe's identity is protected because it is in the public interest to do so, but instead argues that the second exception listed above applies in this case. Fawell argues that his client will be subjected to a felony prosecution for not reporting the accident within three hours after it

occurred (Ill. Rev. Stat. 1987, ch. 95 1/2, par. 11-401(b)), along with the possibility of having his driving privileges revoked and becoming the focus of a civil lawsuit.

Plaintiff disagrees, arguing that had Deputy Paine accepted the report, including the client's name, on the night in question, John Doe would have been subject to all of the above-mentioned penalties except being charged with a felony for failing to report the accident within the specified time period. In addition, plaintiff included a letter in the appendix to its brief from the DuPage County State's Attorney's office, dated September 12, 1989, which stated that John Doe would be placed back in the same legal position he would have been in had Deputy Paine accepted the report. Thus, according to the letter, John Doe would not be subject to the felony charge for not reporting the

accident. Plaintiff concludes that the unique circumstances present in this case do not rise to the level to be recognized as an exception to the general rule favoring disclosure of a client's identity.

We note here that Fawell filed a motion to strike the letter from the DuPage County State's Attorney's Office from plaintiff's brief. Fawell argued that the letter was dated September 12, 1989, 13 days after the notice of appeal was filed, and thus was not in existence during the trial court proceedings. We granted Fawell's motion on April 5, 1990, and will consider this appeal in accordance with this ruling.

Addressing the merits of this issue, issue, we agree with Fawell that the disclosure of John Doe's identity could prejudice John Doe in "some substantial way." (Williams, 97 Ill. 2d at 295.)

Should Fawell be required to reveal his client's name, the client would be faced with potential criminal and civil liability. Admittedly, John Doe would have been faced with a possibility of criminal and civil liability had Deputy Paine accepted the report on the night in question. However, he would not have been subjected to the possibility of being charged with a felony for failing to report the accident had Deputy Paine accepted the report. We thus conclude that the "substantial harm" exception to the general rule favoring disclosure applies under the specific facts in this case.

We find support for our decision in the recent decision in In Re Grand Jury Proceeding, Cherney (7th Cir. 1990), 898 F.2d 565. In Cherney, the court noted that a client's identity is protected where disclosure would reveal a client's reason

for seeking legal advice. (Cherney, 898 F.2d at 568.) The Cherney court was faced with a situation in which attorney Cherney was representing Jack Hrvatin in a drug conspiracy case. Hrvatin's fees were paid by an unidentified person who also sought Cherney's legal advice concerning the conspiracy. The court of appeals held that the unidentified client's identity was privileged because its disclosure "would be tantamount to revealing the premise of confidential communication: the very substantive reason that the client sought legal advice in the first place." 898 F.2d at 568.

A similar result was reached in In re Witness-Attorney before Grand Jury No. 83-1 (S.D. Fla. 1984), 613 F. Supp. 394. In Witness-Attorney, the attorney refused to reveal the identity of his client(s) because the attorney received the

information in confidence, and to reveal such a confidence would provide the government with the "last link" in an existing chain of incriminating evidence likely to lead to the indictment of the client(s) on drug-smuggling charges. (Witness-Attorney, 613 F. Supp. at 398-99.) The district court agreed, holding that the information was privileged based on the "last link" exception. (613 F.Supp. at 399.) The court noted that the attorney-client relationship must be maintained "even though the result may be distasteful." 613 F.Supp. at 400.

Several other courts have reached similar results. See Tillotson v. Boughner (7th Cir. 1965), 350 F.2d 663 (client's identity privileged where disclosure would result in prejudice and identity was a confidential communication); Baird v. Koerner (9th Cir. 1960), 279 F.2d 623, 633

(identification privileged if disclosure would reveal the "ultimate motive of litigation" and be the "link that could form the chain of testimony necessary to convict an individual of a federal crime"); Ravary v. Reed (1987), 163 Mich. App. 447, 415 N.W.2d 240 (disclosure of client's name not required because it would be tantamount to disclosing the substance of a confidential communication). See generally Asserting the Attorney-Client Privilege: Client Identity, Fee Information, Whereabouts, and Documents, 3 Georgetown Journal of Legal Ethics 113 (1989); 81 Am. Jur. 2d Witnesses, Section 213 (1976).

Our result here is consistent with the balancing test set out in People v. Doe (1977), 55 Ill.App. 3d 811. In Doe, the court stated that a balance must be struck between the purpose of the attorney-client privilege and the public interest in

obtaining disclosure of evidence. (Doe, 55 Ill. App. 3d at 814.) The court favored disclosure of Doe's identity because there was "no suggestion" that the client would be incriminated or in any way harmed if his identity was revealed. (55 Ill. App. 3d at 814-15.) Thus, there was no reason to deviate from the general rule that the client's identity is not privileged.

In the present case, the client's identity was a confidential communication of which disclosure could result in "substantial harm" to him. Thus, this is one of the unique and unusual cases in which an exception to the general rule favoring disclosure must be recognized.

Having determined that an exception to the general rule applies in this case, we must next address the question of whether a waiver of the privilege occurred when the client attempted to reveal his

identity but was unsuccessful in doing so. We answer this question in the affirmative and hold that the client did waive his claim of privilege with respect to his identity under the specific facts of this case.

We note that the attorney-client privilege can be waived, but only by the client. (People v. Mudge (1986), 143 Ill. App. 3d 193, 195.) This is so because the privilege belongs to the client, and not to the attorney. (People v. Duarte (1979), 79 Ill. App. 3d 110, 125; People v. Marcofsky (1920), 219 Ill. App. 230, 232; M. Graham, Cleary & Graham's Handbook of Illinois Evidence Section 505.6, at 259 (4th ed. 1984).) Plaintiff contends that "John Doe never intended his identity to be confidential. He thereby waived any privilege." Plaintiff points out that Fawell conferred with John Doe on the night

in question and, as a result, prepared a short written statement to present to the sheriff's office concerning the automobile accident in order to comply with section 11-401(b) of the Code. This section provides, in pertinent part:

"Any person who has failed to stop or to comply with said requirements shall, within 3 hours after such motor vehicle accident, *** report the place of the accident, the date, the approximate time, the driver's name and address, the registration number of the vehicle driven, and the names of all other occupants of such vehicle, at a police station or sheriff's office near the place where such accident occurred." (Emphasis added.)(Ill. Rev. Stat. 1987, ch. 95 1/2, par. 11-401(b).) Plaintiff argues that John Doe waived any possible privilege as to his identity because he never intended his

identity to be confidential. Plaintiff points out that John Doe attempted to comply with the reporting provisions contained in the Code, which by its very terms would have required John Doe to disclose his name to the sheriff's deputy. Plaintiff asserts that John Doe's identity did not originate in a confidence and with an understanding that it would not be disclosed. (See Consolidated Coal Co. v. Bucyrus-Erie Co. (1982), 89 Ill. 2d 103, 119.) Plaintiff makes this waiver argument despite the fact that no report identifying John Doe was ever successfully made to the sheriff's department.

Fawell disagrees, arguing instead that there can be no waiver of the privilege because John Doe was under the "compulsion" of Section 11-401(b) of the Code to make the report after the accident. Fawell points out that John Doe attempted

to file the report only to avoid "becoming a convicted felon." Fawell asserts that the attempt to file the report was involuntary and, furthermore, that no report divulging John Doe's identity was ever accepted.

In support thereof, Fawell cites New Jersey v. Portash (1979), 440 U.S. 450, 59 L. Ed. 2d 501, 99 S. Ct. 1292. In Portash, the defendant was granted immunity to testify before a grand jury. Thereafter, he was charged with a criminal offense. The trial court ruled that the State could use the immunized grand jury testimony to impeach the defendant's credibility at trial. The Supreme Court disagreed, holding that testimony given in response to immunity is "the essence of coerced testimony." (Portash, 440 U.S. at 459, 59 L. Ed. 2d at 510, 99 S. Ct. at 1297.) The Court noted that the testimony was

"compelled" and thus could not be used to impeach him at a later criminal trial.

Fawell contends that Portash supports his position because the statute in the case at bar also contains an immunity clause. This clause states:

"No report made as required under this paragraph shall be used, directly or indirectly, as a basis for the prosecution of any violation of paragraph (a)." (Ill. Rev. Stat. 1987, ch. 95 1/2, par. 11-401(b).) In order to encourage compliance with this section, the legislature has determined that a person who fails to comply "shall be guilty of a Class 4 felony." Ill. Rev. Stat. 1987, ch. 95 1/2, par. 11-401(d).

Fawell also points out that other courts have determined that a waiver of the attorney-client privilege does not occur when the testimony is involuntarily given.

In Simpson v. Braider (D.D.C. 1985), 104 F.R.D. 512, the Federal magistrate pointed out that testimony given pursuant to a subpoena, to defend against criminal charges, or "under circumstances indicating that there was realistically no voluntary disclosure" should not result in a waiver of the attorney-client privilege. Simpson, 104 F.R.D. at 523; see also Transamerica Computer Co. v. International Business Machine Corp. (9th Cir. 1978), 573 F.2d 646, 651 (privilege waived only if the disclosure of confidential material is "voluntary and not compelled").

We find Portash and Simpson to be distinguishable from the specific facts in the present case. Initially, we note that Simpson involved a waiver question in the context of the physician-patient privilege and did not involve an attorney-client relationship like that present in the case

at bar. Furthermore, Portash did not involve the attorney-client privilege, but instead was concerned with waiver under a Fifth and Fourteenth Amendment analysis.

Notwithstanding these distinctions, we also note that our case does not involve testimony given pursuant to immunity at a grand jury proceeding or testimony pursuant to a subpoena. In these instances, the testimony was compelled because the person so testifying had no reasonable way to avoid the grand jury or subpoena. Instead, our case involves John Doe's attempt, presumably pursuant to Fawell's advice, to report the accident to the sheriff's office. Thus, it is evident that John Doe intended, at least on the night in question, that his name be revealed in order to comply with Section 11-401(b) of the Code. John Doe chose to comply with the reporting provision of this

section in order to avoid being prosecuted for a felony. The statute itself did not compel him to do so. This situation is unlike the above-mentioned cases in that the client here intended to disclose the information and was not forced or compelled to do so.

Furthermore, it is important to point out that the reporting provisions of Section 11-401(b) of the Code do not require the driver of the automobile to relate the circumstances or details of the accident itself. This section simply requires a driver to identify himself or herself without providing any information which may indicate that a criminal offense had actually occurred.

With respect to Fawell's argument that the reporting requirement "compelled" John Doe into making a report, we note that our supreme court has determined, in People

v. Lucus (1968), 41 Ill. 2d 370, that requiring a driver to reveal his name and address does not infringe upon the driver's "guaranty against self-incrimination." (Lucus, 41 Ill. 2d at 373-74.) The court noted that the act of identification, by itself, in no way relates to the circumstances of the accident or provides information concerning the details of the event. (41 Ill. 2d at 374.) While Lucus involved the construction of section 135 of the Code (now codified as section 11-403 (Ill. Rev. Stat. 1987, ch. 95 1/2, par. 11-403)) and also involved the Fifth Amendment claim as opposed to an attorney-client privilege analysis, we find its reasoning concerning the requirement of providing a driver's name and address persuasive under the facts in the case at bar.

Furthermore, our supreme court has also determined that matters a client

intends to disclose to third parties, who are not agents of either the attorney or client, are not privileged. (In re Himmel (1988), 125 Ill. 2d 531, 542; People v. Werhollick (1970), 45 Ill. 2d 459, 462; see also People v. Adams (1983), 116 Ill. App. 3d 315, 322 (information intended to be revealed to third parties not privileged).) Given that John Doe intended to disclose the information concerning his identity to a third party (Deputy Paine), we find that any privilege he had with respect to his identity was waived.

We next address the issue of whether it would have been unethical for Fawell to reveal the identity of his client in this case. Fawell contends that John Doe's identity is a "confidence" or "secret" which cannot be disclosed under the Code of Professional Responsibility. The ISBA devotes a considerable portion of its brief

in support of Fawell's position on this issue.

According to Canon 4 of the Code of Professional Responsibility, which our supreme court has adopted, an attorney "should preserve the confidences and secrets of a client." (107 Ill. 2d Canon 4.) A "confidence" is defined as "information protected by the attorney-client privilege under applicable law," while a "secret" involves "other information gained in the professional relationship that the client has requested be held involate or the disclosure of which would be embarrassing to or would likely be detrimental to the client." 107 Ill. 2d R. 4-101(a).

We have already determined that John Doe's identity in this case was privileged information. Thus, had there been no waiver of the privilege with

respect to this information, Fawell would not be forced to disclose his client's identity. Our determination on this issue would certainly classify John Doe's identity, but for the waiver, as a "confidence" pursuant to Rule 4-101(a). However, because we have already determined that John Doe waived the privilege with respect to his identity, we do not believe that his identity can be properly classified as a "confidence."

Furthermore, even if we were to find that John Doe's identity was a "secret," we still do not believe that it would have been unethical for Fawell to reveal John Doe's identity. Plaintiff correctly points out that an exception to Rule 4-101(a) exists in this case because Fawell is under a court order to reveal his client's identity. Rule 4-101(d)(2) states that an attorney may reveal "confidences or

secrets when permitted under disciplinary rules or required by law or court order." (Emphasis added.) (107 Ill. 2d R. 4-101(d)(2).) Thus, revealing John Doe's identity, even though it may be classified as a confidence or secret, would not subject Fawell to discipline for violating the Code of Professional Responsibility.

We agree with the ISBA's position that even though a court order has directed Fawell to reveal John Doe's identity, the decision is still within Fawell's discretion based on our Code of Professional Responsibility. This is the case because Rule 4-101(d)(2) states that an attorney "may," and not "shall," disclose client confidences when under a court order to do so. The ISBA points out that ISBA Opinion No. 538 (August 27, 1976) addressed a similar issue and determined that the attorney's decision whether to

disclose the client's identity was discretionary, with neither decision violating the Code of Professional Responsibility.

The trial court was aware of the inherent conflict Fawell faced between complying with the court order and not revealing any confidences of his client. The court stated:

"I think the Court must by its inherent power-and I do this with reluctance. I have a great deal of respect for Mr. Jeff Fawell and both counsel that appear before me.

By the same token, we have a difference of opinion. Any that's all been announced, even with that great respect I have for him, Mr. Fawell, Jeffrey Fawell.

However, I must enforce my orders.

***

I know Mr. Fawell is an honorable

lawyer***.

***

***I do this with all due respect to Mr. Fawell.

***

I know its done as a difference of opinion." We also realize the predicament Fawell is faced with in this case as he attempts to harmonize his ethical responsibility to his client and his duty as an officer of the court. It is our opinion that, given the waiver of the client's identity in this case, Fawell's duty to obey the court order, at least with respect to the question number one, must supersede his perceived ethical duty to his client to keep the identity a "secret." Thus, we hold that the trial court properly ordered Fawell to answer the first question. By answering this question, Fawell will not be violating the Code of

Professional Responsibility.

We must next address the propriety of the other question at issue in this appeal. Question number three asked Fawell to reveal what he told Deputy Paine with reference to the location of the accident. The answer to this question is clearly not protected by the attorney-client privilege. The question, by its very terms, asks Fawell to reveal information which he disclosed to a third party (Deputy Paine). Thus, even if this information was obtained through confidential communications with John Doe, it is evident that the disclosure to the third party, who was not the agent of the client or Fawell, resulted in the waiver or destruction of the privilege. (Werhollick, 45 Ill. 2d at 462; In re Langswager (N.D. Ill (1975), 392 F. Supp. 783, 786; see also Spencer v. Burns (1952), 413 Ill. 240,

248 ("communications made by a client to an attorney for the purpose of being disclosed by him to others do not fall within the rule of privilege").) The justification for this rule is that communications are not considered to be made in confidence when they are intended to be disclosed to a third party. (Henderson v. National R.R. Passenger Corp. (N.D. Ill. 1986), 113 F.R.D. 502, 509; Suburban Sew 'n Sweep, Inc. v. Swiss-Bernina, Inc. (N.D. Ill. 1981), 91 F.R.D. 254, 258-59.) Absent any attorney-client privilege with respect to this question, we find no error in the trial court's order requiring Fawell to answer the question.

In sum, we hold that the trial court properly ordered Fawell to answer questions one and three. We need not address the propriety of questions two and four due to the fact that plaintiff waived

consideration of these questions during oral argument in this case.

We must next address the final issue in this case: namely, whether the contempt order violated Fawell's due process rights and whether the sentence imposed was excessive. Fawell argues that he was not notified as to the charges against him because there was no citation or charge filed against him. Fawell also asserts that he was unable to present an appropriate defense and was not proved guilty beyond a reasonable doubt. In order to address Fawell's due process argument we must first determine what type of contempt is involved in this case.

Criminal contempt is conduct which is directed against the dignity and authority of the court. (People ex rel. Kazubowski v. Ray (1971), 48 Ill. 2d 413, 416, cert. denied (1971), 404 U.S. 818, 30

L. Ed. 2d 118, 92 S. Ct. 78; Central Production Credit Association v. Kruse (1987), 156 Ill. App. 3d 526, 531.) In comparison, civil contempt is coercive in nature and usually consists of failing to comply with a court order. (Kazubowski, 48 Ill. 2d at 416; In re Estate of Maslowe (1985), 133 Ill. App. 3d 1043, 1046.) This case involves civil contempt because Fawell's contempt was based upon his failure to comply with a court order, which could be purged by his compliance with the terms of the order. See People v. Boclair (1987), 119 Ill. 2d 368, 373; People v. Rodriquez (1987), 162 Ill. App. 3d 149, 153-54.

We must also determine whether the contempt in this case was direct or indirect. Direct contempt arises from acts that are committed in the court's presence, while indirect contempt arises from acts

that occur outside the presence of the court. (Central Production, 156 Ill. App. 3d at 531; People v. Patrick (1980), 83 Ill. App. 3d 951, 954.) In the present case, the trial court ordered Fawell to "answer the questions before 4:30 this afternoon." The court then continued the matter to 9:30 a.m. the following day "to find out what happened." Thus, the question of whether Fawell complied with the order involved circumstances existing outside the presence of the court, making this contempt indirect.

Having determined that this case involves indirect civil contempt, we must next decide whether Fawell's due process rights were violated. Ordinarily, the alleged contemnor in an indirect contempt situation is entitled to notice, a fair hearing, and an opportunity to be heard. (Weglarz v. Bruck (1984), 128 Ill. App. 3d

1, 8; Sunset Travel, Inc. v. Lovecchio (1983), 113 Ill. App. 3d 669, 675.) However, when the alleged contemnor admits such an indirect contempt in court, it may be punished as a direct contempt. In re Estate of Melody (1969), 42 Ill. 2d 451, 453.

This is precisely the situation in the case at bar. The trial court asked Fawell, "Have you answered the questions?" to which Fawell's attorney replied, "No, he has not, Judge." Fawell then agreed that he did not answer the questions, even though he understood what the court order required him to do. Fawell's attorney then told the trial court that "[h]e is not going to answer them." Thus, this is an instance where the trial court properly summarily punished Fawell even though the contemptuous conduct occurred out of the court's presence, given that Fawell

admitted in open court that he would not comply with the court order. (See People v. Pomeroy (1950), 405 Ill. 175, 180.) We find no violation of Fawell's due process rights under these circumstances.

We next address the propriety of the sentence imposed in this case. Fawell, along with the Du Page County Bar Association and the Du Page Association of Women Lawyers, contends that the $1,000-per-day fine was excessive given the importance of the issue involved and the substantial difference of opinion on this issue. The power to punish for contempt rests within the sound discretion of the trial court, and its decision will not be overturned absent a clear abuse of discretion. (In re Estate of Wernick (1988), 176 Ill. App. 3d 153, 156, cert. denied (1989), _____ U.S. ____, 107 L. Ed. 2d 19, 110 S. Ct. 50; Central Production,

156 Ill. App. 3d at 531.) Given the underlying statute of limitations problem in the civil lawsuit, it is clear that the trial court imposed a severe fine because it was concerned with having Fawell comply with the order in a short period of time. However, the statute of limitations has now run in the civil lawsuit, and thus the immediacy which the trial court was properly concerned with is no longer an issue in this case. Given that the trial court determined that Fawell's refusal to answer the questions was not done in a contemptuous manner, but instead was done based on a difference of opinion, we agree with Fawell that the amount of the fine should be reduced. Under these unusual circumstances, we determine that the fine of $1,000 per day should be reduced to $100 per day, as we now expect Fawell to comply with the court order.

For the above-stated reasons, the order of the circuit court of Du Page County is affirmed with respect to questions one and three. Fawell is directed to answer these questions. The order with respect to questions two and four is vacated, as plaintiff determined not to pursue these questions on appeal. We have also reduced Fawell's fine to $100 per day should Fawell refuse to answer questions one and three.

Affirmed in part, vacated in part, and modified in part.

REINHARD,J., concurs.

JUSTICE WOODWARD, specially concurring:

I agree with the majority that the facts in this case invoke the "substantial harm" exception to the general rule that disclosure of a client's name is not protected by the attorney-client privilege.

Under the facts of this case, the attorney-client privilege has been waived. Succinctly, John Doe waived the attorney-client privilege of his own accord and with the consent and approval of attorney Fawell when he accompanied Fawell to the sheriff's office where Fawell attempted to file the required report.

Fawell stated that his client, John Doe, accompanied him to the sheriff's office, which was a public building, and the route to get to the building was exposed to the view of anyone present. Fawell stated that his client was standing in the general vicinity of where he was standing when he attempted to give the report to deputy sheriff Paine. Fawell stated that he did indicate to Paine that his client was with him by a gesture of his hand. Fawell described the window that Paine was behind when he attempted to

submit the report. It was similar to a walk-up bank window with thick glass and a U-shaped opening under the window.

In his argument to this court, Fawell draws a distinction between acts that are "compelled" and those that are "voluntary." Although the majority rejected this argument, I agree with Fawell that since the making of the report was required by section 11-401(b), it was "compelled" testimony and, therefore, did not waive the attorney-client privilege. (See New Jersey v. Portash (1979), 440 U.S. 450, 59 L. Ed. 2d 501, 99 S. Ct. 1292; Simpson v. Braider (D.D.C. 1985), 104 F.R.D. 512.) However, nothing "compelled" John Doe to accompany Fawell to the sheriff's office, a public building, to make the report.

The purpose behind section 11-401(b) of the Illinois Vehicle Code (Ill. Rev. Stat. 1987, ch. 95 1/2, par. 11-401(b)) is

to obtain information. Nothing in the language of that statute prohibits a third party, such as an attorney, from making the report on behalf of a client. Indeed, that is exactly what Fawell was attempting to do when he began to read the statement to Deputy Paine. By doing so, Fawell acknowledged that his client's presence at the sheriff's office was unnecessary and hence not "compelled" but "voluntary." The fact that Deputy Paine did not see John Doe is irrelevant since Fawell testified that John Doe accompanied him to the sheriff's office; therefore, there was no intent by Fawell or John Doe not to disclose John Doe's identity. Thus, although the making of the report was required by the statute and, therefore, "compelled," John Doe's presence at the sheriff's office was voluntary and with his attorney's consent. These facts waive the attorney-client privilege.

STATE OF ILLINOIS)
) SS
COUNTY OF DU PAGE)

MARISU CESENA, Administrator of the Estate of TIMOTHY J. GOLDEN, Deceased, Plaintiff,

vs.

DU PAGE COUNTY, A Municipal Corporation, Sheriff of DuPage County, a Municipal Corporation, and Mitchell Paine, Defendants,

vs.

JEFFREY B. FAWELL, Contemnor.

NO. 89 CC 33

ORDER

This cause having come on to be heard upon the motion of the Plaintiff and the Court being fully advised in the premises, and having jurisdiction of the subject matter: IT IS HEREBY ORDERED the Motion to Reconsider is denied. It is further ordered that the witness Jeffrey Fawell is held in civil contempt for failing to comply with this Court's order of Aug-

gust 28, 1989 in which this Court ordered Jeffrey Fawell to answer specific questions presented to him during his deposition on March 19, 1989. It is further ordered that Mr. J. Fawell is fined $1,000.00 a day beginning at 10 a.m. on August 29, 1989 until Mr. Jeffrey Fawell complies with this Court's August 28, 1989 order. Mr. Fawell was ordered incarcerated with a bond set at $10,000.00. Defendant was released on his own recognizance and ordered to appear on September 5, 1989 at 9 a.m.

ENTER: ANTHONY M. PECCARELLI
Judge

Date: 8-29-89

Supreme Court, U.S.
FILED
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(2)

No. 91-1590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

Jeffrey B. Fawell,

Petitioner,

v.

Marisu Cesena, Administrator of the Estate of Timothy J. Golden, Deceased,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Supreme Court of Illinois properly exercised its equitable jurisdiction when it held that John Doe's accident report was deemed to have been timely filed in accordance with the requirements under Ill. Rev. Stat. (1987), ch. 95½, par. 11-401(b).

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STATUTE INVOLVED

28 U.S.C. § 1257(A) (1991)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

The material facts of this case are not controverted. For purposes of Jeffrey B. Fawell's petition for writ of certiorari, this Court should rely on the facts presented by the Supreme Court of Illinois in its opinion. (Petitioner's Appendix, 1-5).

ARGUMENT

The decision of the Supreme Court of Illinois in this case was pragmatic and just. The Supreme Court of Illinois protected the rights of all parties by placing everyone back in the positions they would have been if Officer Payne had accepted the report. The issues of attorney-client privilege and petitioner's purported dilemma arose only because the DuPage County deputy sheriff committed an error when he refused to accept John Doe's accident report. Had the deputy sheriff accepted the report in accordance with the Illinois Reporting Statute, John Doe would have timely filed his accident report, respondent would have discovered John Doe's identity, and petitioner would not have confronted any attorney-client privilege issues. The Supreme Court of Illinois simply acknowledged that the deputy sheriff did commit an error and rectified the entire problem by ordering John Doe's accident report to be considered as timely filed. The order of the Illinois Supreme Court placed John Doe and the petitioner back to the positions they would have found themselves had the deputy sheriff accepted the accident report on September 29, 1987. John Doe's rights are protected. He is

granted the same immunities and is subject to the same criminal and civil consequences of his actions as any other driver in the State of Illinois who reported an accident within the three hour limit. The holding was clearly pragmatic and patently just. This writ of certiorari is petitioner's last gasp attempt to create a legal problem where obviously none exists. It should be rejected.

CONCLUSION

Respondent, Marisu Cesena, Administrator of the Estate of Timothy J. Golden, Deceased, through her attorney, requests this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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